UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ASSOCIATED PRESS, **Plaintiff,** **- against -** **UNITED STATES DEPARTMENT OF DEFENSE,** **Defendant.**	:	**ECF Case** **Index No. 05 Civ. 3941 (JSR)**

MEMORANDUM IN OPPOSTION TO
DEFENDANT'S MOTION FOR RECONSIDERATION

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PRELIMINARY STATEMENT

Plaintiff Associated Press ("AP") submits this memorandum in opposition to the motion of the Department of Defense ("DOD") for reconsideration of the Court's August 29, 2005 Order directing DOD to inquire of each detainee held at the U.S. Naval Base in Guantanamo Bay, Cuba whether he objects to the release of identifying information contained in the records of his Combatant Status Review Tribunal ("CSRT" or "Tribunal"). Reconsideration should be denied because DOD fails to demonstrate that the Court overlooked any controlling issue of fact or law that was presented on the underlying motion, and because the relief entered was well-within the authority and discretion of the Court. To the extent that the Court has any concerns about directing DOD to question the detainees, any possible issue can be alleviated by directing that a third-party—either AP or an international organization such as the Red Cross—be allowed to seek privacy waivers from the detainees, rather than require DOD to question the detainees itself.

BACKGROUND

In response to the filing of this Freedom of Information Act ("FOIA") lawsuit, DOD provided AP the transcripts, evidence and related materials from the official records of Tribunals convened to determine the "enemy combatant" status of 538 men held at Guantanamo. The records produced, however, were heavily redacted—omitting all detainee names, nationalities, ages, and religions, together with any references to locations, employment, political organizations, friends and acquaintances, or other details that might identify the detainee who was the subject of a specific Tribunal.

DOD then moved for summary judgment. Asserting that it had complied with its FOIA obligations, DOD contended that the withheld information was exempt from disclosure under FOIA Exemption 6 because its release would constitute an "unwarranted invasion" of the privacy of the detainees. After briefing and argument on that motion, on July 29, 2005, the

Court directed supplemental submissions on whether it could require each detainee to be asked whether he objects to the release of the requested information on privacy grounds.

In its August 29, 2005 memorandum order ("Order"), the Court directed DOD to ask each detainee whether he wishes the redacted information relating to his identity to be released to AP. DOD has now moved for reconsideration of that Order. As discussed below, DOD's motion is improper under Federal Rule of Civil Procedure 59(e) and Local Rule 6.3, and its basic premise—that the Court has no authority to consider the views of individual detainees under Exemption 6—is plainly incorrect. FOIA contemplates that the views of parties with privacy and other interests at stake in a request for disclosure are relevant to the application of the statutory exemptions. Indeed, privacy waivers are routinely obtained by FOIA requesters and acknowledged by agencies in applying Exemption 6 in other contexts. The Court properly exercised its discretion in seeking to know whether individual detainees are willing to execute such a waiver with respect to records of their own Tribunal.

ARGUMENT

I.
DOD'S MOTION FOR RECONSIDERATION DOES NOT PRESENT ANY OVERLOOKED ISSUE

Motions for reconsideration are governed by Federal Rule of Civil Procedure 59(e) and Local Rule 6.3. To succeed on a motion for reconsideration, "'the moving party must demonstrate that the court overlooked the controlling decisions or factual matters that were placed before the court in the underlying motion.'" *Eng v. New York City Police Dep't*, 1997 WL 699821, at *1 (S.D.N.Y. Nov. 7, 1997) (citation omitted). This standard "is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked." *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d

Cir. 1995); *see also Schermerhorn v. James*, 1998 WL 40205, at *3 (S.D.N.Y. Feb. 2, 1998). New arguments may not be raised in a motion for reconsideration. *See Metropolitan Opera Ass'n, Inc. v. Local 100*, 2004 WL 1943099, at *1 (S.D.N.Y. Aug. 27, 2004); *Richard Feiner & Co., Inc. v. BMG Music Spain, S.A.*, 2003 WL 21496812, at *1 (S.D.N.Y. June 27, 2003). Nor may parties "regurgitate the arguments" the court previously rejected. *Charter Oak Fire Ins. Co. ex rel. Milton Fabrics, Inc. v. National Wholesale Liquidators*, 2003 WL 22455321, at *1 (S.D.N.Y. Oct. 29, 2003).

DOD refers to these standards, but then ignores them. DOD does not contend that the Court overlooked any controlling decisions or factual matters. Instead, it simply reasserts the arguments that FOIA does not permit consideration of third-party views, that the Court should use a "categorical" approach rather than a case-by-case review, and that the Court's order imposes an improper logistical burden on it. These arguments were raised and fully addressed by the Court, and DOD does not identify any overlooked fact or legal principle. DOD also raises the new arguments that the Court's order would violate the separation of powers and that the Court must defer to DOD's assessment of the difficulty of questioning detainees. Because none of this is proper material for a motion to reconsider, it should be denied.

II.
THE ORDER DID NOT MISAPPLY OR MISCONSTRUE FOIA

The Court's Order effectively does no more than require DOD to permit requests for privacy waivers to be submitted to the detainees. This input is plainly appropriate under FOIA, and the Court did not overlook or misperceive any issue of law or fact in seeking this input.

A. FOIA Does Not Proscribe Consideration of the Detainee's Views of Their Own Privacy

Repeating an argument from its August 12, 2005 letter brief, DOD first contends that the Court misperceived the operation of FOIA and claims that Exemption 6 does not permit the views of third parties whose privacy interests are affected by a request to be considered by the Court. AP previously established that this plainly is not so. *See* AP's Supplemental Memorandum in Opposition to Defendant's Motion for Summary Judgment at 2-5. As demonstrated, both courts and agencies widely recognize that the views of a third party whose interests are directly at stake in a FOIA disclosure are relevant to the proper application of the FOIA exemptions. For example, Exemption 4 protects trade secrets and confidential commercial information, and agencies routinely solicit the views of affected third parties when requests come in for the release of such information. *See, e.g.*, 32 C.F.R. § 701.11(r)(1) (Navy regulations on soliciting third party input before a FOIA release of confidential information); *see also* 32 C.F.R. § 518.65 (similar Army regulations). Indeed, all government agencies are required to have regulations to notify third-parties who submit confidential information that may be subject to a FOIA request. *See Exec. Order No. 12600*, 52 Fed. Reg. 23781 (June 23, 1987).

The privacy provisions in Exemption 6 raise no different issue. "The privacy interest at stake in FOIA exemption analysis *belongs to the individual*, not the agency holding the information." *Sherman v. U.S. Dep't of the Army*, 244 F.3d 357, 363 (5th Cir. 2001) (emphasis added) (*citing U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 763-65 (1989)). It is thus well established that individuals may waive their own privacy interest protected by FOIA, *e.g.*, *Sherman*, 244 F.3d at 364 (individual may waive Exemption 6 privacy interest); *Computer Prof'ls for Social Responsibility v. U.S. Secret Service*, 72 F.3d 897, 904 (D.C. Cir. 1996) (same under Exemption 7(c)), and the federal government routinely releases information it would otherwise withhold under the FOIA privacy provisions if a valid privacy waiver is submitted. *See, e.g.*, *Spurlock v. FBI*, 69 F.3d 1010, 1013 (9th Cir. 1995) (releasing additional documents after receiving waiver); *Taylor v. U.S. Dep't of Justice*, 257 F. Supp. 2d

101, 113 n.17 (D.D.C. 2003) (citing FBI declaration that third party may waive privacy interest). The Court's Order does nothing more than seek the functional equivalent of a privacy waiver.

It is equally established that the Court may require information concerning the wishes of individuals whose interests are at stake to be solicited in a FOIA dispute. The Court properly relied upon *War Babes v. Wilson*, where a group of British citizens requested information about former U.S. servicemen who were stationed in Great Britain during World War II. *See* 770 F. Supp. 1 (D.D.C. 1990). The *War Babes* requesters believed that the servicemen were their natural fathers, yet the government refused to disclose the addresses of the servicemen. As here, the government asserted that disclosure would constitute a "clearly unwarranted invasion of personal privacy." *Id.* at 1-2 (citation omitted). Because it was "the 'privacy' of the servicemen, and of no one else, which is implicated by the request," the court concluded that evidence of the servicemen's views was directly relevant to a judicial determination of whether the FOIA exemption was properly invoked. *Id.* at 4. Without any evidence about the servicemen's actual views, the government's claim that disclosure "would invite an 'unwanted intrusion'. . . [was] sheer speculation." *Id.* When the requesters submitted evidence that some servicemen were "'delighted' to have been discovered," *id,* the court ordered all of the records released unless the government provided declarations from specific individual servicemen indicating that they did not want their address disclosed. *Id.* at 5.

As this Court properly recognized, evidence about desires of the detainees whose privacy interests are implicated is similarly relevant to the proper application of Exemption 6 in this case. In reaching this conclusion, the Court did not overlook any evidence. On the record before the Court, the claim by DOD that detainees would prefer to keep their identities secret is "sheer speculation" and, as in *War Babes*, there is reason to doubt the government's privacy analysis.

Many detainees have indicated through their families that they want their stories publicized, and in the last several weeks, hundreds of detainees have attempted to call public attention to their confinement by engaging in a hunger strike. *See* Carol Leoning, *More Join Guantanamo Hunger Strike*, Wash. Post, Sept. 13, 2005, at A3; Letta Tayler, *'People Will Definitely Die'; Guantanamo Inmates Resolute In Second Month of Hunger Strike*, Newsday, Sept. 10, 2005, at A14.

DOD's claim that the Order misapplied *War Babes* and a similar ruling in *Center for National Security Studies v. U.S. Dep't of Justice*, 215 F. Supp. 2d 94 (D.D.C. 2002), *aff'd in part, rev'd in part on other grounds*, 331 F.3d 918 (D.C. Cir. 2003), is entirely misdirected. DOD contends that these cases are distinguishable because both courts first determined that the public interest in disclosure required records to be released, but then provided the third parties an opportunity to opt-out of disclosure, whereas the Court's Order solicits the detainees' views before making any initial FOIA determination. This is a distinction without a difference. Simply because the procedure used in *War Babes* and *Center for National Security Studies* was different than that ordered here does not negate the principle for which those cases stand—that input from potentially affected third parties is relevant to the application of Exemption 6.

B. FOIA Does Not Require the Privacy Exemption to be Applied Categorically

DOD is equally off-base in contending that the Court overlooked some supposed obligation under FOIA to apply Exemption 6 categorically, so that the views of individual detainees' are irrelevant. While FOIA may permit categorical determinations, it does not require them. As noted above, agencies routinely accept individual privacy waivers in applying Exemption 6 to information that might generically be considered private.

Not required under FOIA, a categorical approach would not be appropriate here. The approach makes sense only where "a case fits into a genus in which the balance characteristically tips in one direction," *Reporters Committee*, 489 U.S. at 776, which is not at all true of the potential danger resulting from the disclosure of the identity of a detainee. The risk of harm that DOD advances as justification for withholding information under Exemption 6 is likely to vary from case to case depending on the contents of the transcripts and evidence provided to the Tribunal. Similarly, the balancing between the public and private interests of the withheld information is likely to be different for different detainees. In such situations, any balancing should be done on a case-by-case basis, not categorically. *See, e.g.*, *U.S. Dep't of State v. Ray*, 502 U.S. 164, 176 n.12 (1991) (disclosure of names and other identifying information not always a significant threat to privacy of named individuals); *Badhwar v. U.S. Dep't of the Air Force*, 829 F.2d 182, 185 (D.C. Cir. 1987) (Exemption 6 by its nature requires "a case-by-case evaluation").

DOD's repeated argument that Exemption 6 requires a categorical approach in this case is contradicted by DOD's own prior application of the exemption. In responding to AP's FOIA request, DOD did not apply Exemption 6 uniformly to withhold all identifying information, but reviewed the files on a case-by case basis and released identifying details of detainees who were the subject of habeas corpus petitions, on the grounds that filing a petition waived any privacy concern. *See* Defendant's Memorandum in Support of Summary Judgment at 9 n.5; Declaration of Karen Hecker ¶ 6 n.1. While DOD was plainly correct in releasing this information, its own conduct demonstrates that nothing in FOIA requires a categorical approach to the records requested by AP as it now urges. The Court did not misunderstand or misconstrue FOIA in any respect.

III.
THERE IS NOTHING IMPROPER ABOUT THE COURT'S LITIGATION DISCLOSURE ORDER TO DOD

Asserting a wholly new argument in its motion for reconsideration, DOD contends that the Order requiring it to provide information to the Court on the detainee's privacy views somehow violates the separation of powers. DOD also rehashes points it previously raised about the logistical burden the Order imposes on the government. Neither argument warrants reconsideration.

Arguing that detention of enemy combatants is an integral part of the President's authority to wage war, DOD claims that the Order as written "intrudes on the relationship between the military and the captured enemy combatants" in violation of the separation of powers. While the separation of powers broadly limits the judiciary's control over the executive branch, including the military, DOD's argument sweeps far too broadly. Under DOD's reasoning, for example, it would also be improper for a Court to require it to provide the detainees due process in determining whether they are enemy combatants, a claim rejected by the Supreme Court in *Hamdi v. Rumsfeld*, 542 U.S. 507, 124 S. Ct. 2633, 2650 (2004). The Court "reject[ed] the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts" concerning the detainees, *id.* at 2650, and ordered the government to provide any detainee challenging his classification as an enemy combatant notice of the factual basis for his classification and a fair opportunity to rebut those assertions before a neutral decision maker, *id.* at 2648. Indeed, it is the Tribunals established in the wake of *Hamdi* and of *Rasul v. Bush*, 542 U.S. 466 (2004) that are the subject of this litigation.

The Order here does not even raise the type of serious separation of powers issues rejected in *Hamdi* because it is a simple exercise of the Court's authority to require disclosure from parties before it in order to fulfill the Court's own constitutional role. The Order is not an effort to direct DOD in its control over the detainees, but a disclosure order, clearly authorized by the Federal Rules of Civil Procedure, requiring a party to provide information relevant to a dispute. *See* Fed. R. Civ. P. 56(f) (authorizing the Court to order "discovery to be had" when the evidence before it on summary judgment is not sufficient to decide the motion); Fed. R. Civ. P. 83(b) (providing that judges "may regulate practice in any manner consistent with" federal law). While the Court should be mindful of the separation of powers, its exercise of this authority to compel a proper factual record is not an unconstitutional interference with the internal operations of an executive agency. *See, e.g., Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 61-64 (D.D.C. 2004) (rejecting federal government's claim that any discovery into "management of foreign relations" regarding detention of U.S. citizen in Saudi Arabia would violate separation of powers, but stating that it would "proceed with care"); *United States v. Karake*, 281 F. Supp. 2d 302, 306-07, 309 (D.D.C. 2003) (ordering federal government to "use its best efforts to obtain the information from all relevant foreign entities").

DOD finally reasserts—with no new facts—its argument that the Court's Order would impose an improper logistical burden, and contends that the Court is required to defer to the military's claims regarding the difficulty of querying the detainees. Although courts sometimes defer to the military regulations and decisions, they are not required to accept the military's assertions. In *Hamdi*, the government asserted that the fact-finding needed to provide alleged enemy combatants due process would unnecessarily burden military officers waging war, and intrude on sensitive national defense secrets. *See* 124 S. Ct. at 2648. The Supreme Court, however, declined to defer to the military's assertions, concluding that it was "unlikely" that the basic process it proscribed for enemy combatants "will have the dire impact on the central functions of war making that the government forecasts." *Id.* at 2649. This Court is not required to accept all factual claims advanced by DOD and did not overlook anything in concluding that there are no "material logistical impediments" to having DOD question the detainees. Order at 4 n.1.

Moreover, any possible concern can be alleviated by directing DOD to permit a third-party to seek privacy waivers from the detainees, rather than require DOD to query them. DOD already permits representatives of the International Red Cross to meet with individual detainees, and arranges for meetings between detainees and their attorneys. *E.g.*, DOD News Release No. 592-05 (June 12, 2005) (available at http://www.defenselink.mil/releases/2005/nr20050612-3661.html). Allowing either the Red Cross, or AP itself, to submit privacy waivers to the detainees could avoid any possible separation of powers or logistical concerns. Indeed, if this were a typical case, AP would have sought privacy waivers directly from the detainees already. Due to the unique circumstances here, it would appear that DOD is better suited to this undertaking, but AP is prepared to pursue other alternatives if the Court prefers.

CONCLUSION

For the foregoing reasons, the Court should deny DOD's motion for reconsideration and either require DOD to provide evidence that the relevant detainees actually wish to assert their right to privacy protected under Exemption 6, or permit an outside organization to question the detainees.

Dated: September 15, 2005

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ASSOCIATED PRESS,	X :	**ECF CASE**
	:	**Index No. 05 CV 3941**
Plaintiff,	:	**Judge Rakoff**
- against -	:	
	:	**PROOF OF SERVICE**
UNITED STATES DEPARTMENT OF DEFENSE,	:	
Defendant.	: X	

STATE OF NEW YORK)
) SS.
COUNTY OF NEW YORK)

SCOTT BAILEY, being duly sworn, deposes and says as follows:

1. I am a legal assistant with the law firm of Levine Sullivan Koch & Schulz, L.L.P. I am not a party to this action, am over 18 years of age, and reside in Brooklyn, New York.

2. On September 15, 2005, I caused to be served a true copy of the Memorandum in Opposition to Defendant's Motion for Reconsideration by first class mail, fax and email upon:

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Scott Bailey

Subscribed and sworn to before me
this 15th day of September, 2005

LISAMARIE APPEL
Notary Public, State of New York
No. 01AP4869703
Qualified in Richmond County
Certificate Filed in New York County
Commission Expires Sept. 2, 2006